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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 772.

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

VS.

THE EXCESS INSURANCE COMPANY OF AMERICA, A CORPORATION, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

SUPPLEMENTAL BRIEF OF PETITIONER.

CLARENCE C. CHILCOTT,
918 Scarritt Building,
Kansas City, Missouri,
STUART T. MCALISTER,
Parsons, Kansas,
Attorneys for Petitioner.

RATNER, MCALISTER & MATTOX,
Of Counsel.

INDEX.

Subject Index.

Summary of Argument..... 1

Argument—

I. As to a pending case..... 2

Respondent's cases distinguished..... 5

II. As to Rule No. 57..... 15

Conclusion..... 19

Table of Cases.

Aetna Casualty & Surety Co. vs. Quarles, 92 Fed. (2d) 321 (CCA 4, 1937)..... 5

Aetna Life Ins. Co. of Hartford, Conn. vs. Martin, 108 Fed. (2d) 824 (CCA 8, 1940)..... 14

American Auto. Ins. Co. vs. Freundt, 103 Fed. (2d) 613 (CCA 7, 1939)..... 5, 8, 13, 14, 19

Employers Liability Assurance Corporation, Ltd. vs. Ryan, 109 Fed. (2d) 690 (CCA 6), certiorari granted June 3, 1940, 310 U. S. 621, 60 S. Ct. 1067, 84 L. ed. 1394, dismissed 311 U. S. 722, 60 S. Ct. 1007, 85 L. ed. 45..... 4

Employers Liability Assurance Corp. vs. Ryan, 109 F. (2d) 690 (CCA 6, 1940); cert. granted 310 U. S. 621, 60 S. Ct. 1067..... 9

Erie vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817..... 5, 6, 22

First National Bank of Fort Scott vs. Elliott, 62 Kansas 764, 64 Pac. 623..... 7

Hill vs. Martin, 296 U. S. 393, 403, 56 S. Ct. 278, 282, 80 L. ed. 293..... 14, 22

Jenkins vs. Kurn, 144 S. W. (2d) 76, 313 U. S. 256, 61 S. Ct. 934..... 20

Kurn vs. Reese, Journal Oklahoma Bar Association, Volume No. 11, No. 20, pages 947-50 (not officially reported). 20

Maryland Casualty Co. vs. Pacific Coal & Oil Co., et al., 312 U. S. 270, 61 S. Ct. 510, 85 L. ed. 455. . . . . 15, 19, 20, 21

Nelson vs. Stull, 65 Kansas 585, 68 Pac. 617. 6

Ohio Casualty Co. vs. Gordon, 95 Fed. (2d) 605 (CCA 10). 5, 6, 8

Southern Ry. Co. vs. Painter, No. 24, 62 S. Ct. 154 (not officially reported). 21

Stoner vs. N. Y. Life Ins. Co., 311 U. S. 464, 85 L. Ed. 275, 61 S. Ct. 336. . . . . 5, 6, 21, 22

Swofford Bros. D. G. Co. vs. John S. Britton D. G. Co., 9 Kansas App. 1, 57 Pac. 235. 6

Thompson vs. Moore, 109 Fed. (2d) 372 (CCA 8, 1940). 14

Toucey vs. N. Y. Life Ins. Co. and Phoenix Finance Corp. vs. Iowa-Wisconsin Bridge Co., Nos. 16 and 19, 62 S. Ct. 139 (not officially reported). 15, 20, 22

U. S. F. & G. Co. vs. Koch, 102 Fed. (2d) 288, l. c. 290 (CCA 3). 2

U. S. Fidelity & Guaranty Co. vs. Koch, 102 Fed. (2d) 288 (CCA 3, 1939). 13

Western Casualty & Ins. Co. vs. Beverforden, 93 Fed. (2d) 166 (CCA 8, 1937). 13

Western Supplies Co. vs. Freeman, 109 F. (2d) 693. . 10

Statutes and Texts.

Compiled Statutes of Oklahoma 1921, Section 340, et seq. 5

Congressional Record, February 1, 1930 2

Declaratory Judgments, Borchard, Second Edition, pp. 312, 313, Note 5 ..... 3, 10

General Statutes of Kansas, Sec. 60-951 6

Oklahoma Statutes 1931, Vol. 1, Section 527, et seq. 5

Oklahoma Statutes of 1931, Sec. 614, Chapter 3, Article 2. 7

Rule 35, U.S.C.A., 310 U. S. 654, 60 S. Ct. Rpr. 1107 .. 11

Senate Report No. 1005, 73d Congress, Second Session, May 10 (Calendar day May 14), 1934 2

Sec. 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C., Sec. 725, 28 U.S.C.A. 725. 22

12 Okla. Stat., Sec. 625, Chapter 3, Article 2 6

U.S.C.A., Rule 57, Title 28, following Sec. 723c 17

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SUPPLEMENTAL BRIEF OF PETITIONER.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner hereby presents to the court his supplemental brief in further support of his petition for a writ of certiorari and to the merits thereof.

SUMMARY OF ARGUMENT.

I.

Respondent's position that "no suit was pending to which respondent was a party" is an admission that an action was pending at the time the bill for declaratory

judgment was filed in which respondent's liability could have been adjudicated, but seeks to avoid the effect of such pending action because it had not yet been summoned as a garnishee. This position is untenable if the principles applicable to the Declaratory Judgment Act are followed.

II.

Rule 57, Rules of Civil Procedure, does not and never did authorize the rendition of a declaratory judgment except in cases where it was *appropriate* and did not change the principle upon which the Quarles case was decided.

ARGUMENT.

I.

As to a Pending Case.

The bill embodying the Declaratory Judgment Act was before Congress several years before it was enacted into law on June 4, 1934, and was given lengthy and grave consideration by Congress before its enactment, see Congressional Record, February 1, 1930; Senate Report No. 1005, 73d Congress, Second Session, May 10 (Calendar day May 14), 1934.

A number of prominent lawyers and professors of law schools testified at committee hearings, including Professor Borchard, the "father" of the Act, *U. S. F. & G. Co.* v. *Koch*, 102 Fed. (2d) 288, l. c. 290 (CCA 3). At the time the bill was being considered the Senate Judiciary Committee had before it the uniform declaratory judgment act, which contained 16 sections. The report stated, page 6, Borchard p. 1048:

"The uniform act contains 16 sections, * * *. There seems no need for such an extensive Federal bill; * * *

"Finally, it may be said that the declaratory-judgment procedure has been molded and settled by thousands of precedents, so that the administration of the law has been definitely clarified."

The report also stated, page 6, Borchard p. 1047:

"The court has discretion, now hardened into a rule, not to issue a judgment if it will not finally settle the rights of the parties."

It appears that not only was Professor Borchard a witness before the Committee, but that he was active in securing the passage of the bill to such an extent that the committee report was prepared by him, Declaratory Judgments, Borchard, Second Edition, p. 312, Note 5.

On the same page Professor Borchard further states:

"The declaratory remedy is not like an ordinary equitable remedy in which the federal courts have on occasion remarked that when the plaintiff has the right to invoke the federal jurisdiction, the court is bound to take the case and proceed to judgment. Nor does the fact that the Report of the Judiciary Committee of the Senate makes no direct reference to the discretionary exercise of the power granted by the Federal Act militate against the rule of discretion."

On page 350 Professor Borchard states:

"Where an action or proceeding is already pending in another forum involving the same issues, it is manifestly unwise and unnecessary to permit a new petition for a declaration to be initiated by the defendant or the plaintiff in that suit."

Again on page 653 he states:

> "The discretion to refuse to exercise federal declaratory jurisdiction is properly applied when a state action is already pending which can easily adjudicate the entire issue between and among all the parties in interest;"

And on page 659:

> "Where identical issues and parties are involved in the state suit and no practical or useful purpose can be served by deciding the case in the federal courts, it is wise policy, especially since the tendency evidenced in *Erie Railroad* v. *Tompkins*, not to exercise the court's admitted jurisdiction."

Professor Borchard is probably the greatest authority on declaratory judgment law in the United States, and his latest work, Second Edition (1941), has been revised and rewritten in the light of the many decisions rendered and experiences had in the administration of the Federal Act. It also appears from the title page that he was co-draftsman of the Federal Rules and we believe his opinion is worth the consideration of this court upon the matters presented.

In the light of the principles referred to, an examination of the cases relied upon by respondent discloses that, with the exception of the case of *Employers Liability Assurance Corporation, Ltd.* v. *Ryan*, 109 Fed. (2d) 690 (CCA 6), certiorari granted June 3, 1940, 310 U. S. 621, 60 S. Ct. 1067, 84 L. ed. 1394, dismissed 311 U. S. 722, 60 S. Ct. 1007, 85 L. ed. 45, they are not applicable herein.

Respondent's Cases Distinguished.

The case of *Ohio Casualty Co.* v. *Gordon*, 95 Fed. (2d) 605 (CCA 10), when carefully analyzed and considered in connection with the holdings of other appellate courts, is not contrary to but in harmony with the cases of *Aetna Casualty & Surety Co.* v. *Quarles*, 92 Fed. (2d) 321 (CCA 4, 1937), and *American Auto. Ins. Co.* v. *Freundt*, 103 Fed. (2d) 613 (CCA 7, 1939).

Whether a garnishment proceeding is a continuation of the original cause of action, or a separate and independent remedy, is to be determined by the law of the state in which the original judgment was rendered. *Erie* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817; *Stoner* v. *N. Y. Life Ins. Co.*, 311 U. S. 464, 85 L. Ed. 275, 61 S. Ct. 336; *American Auto. Ins. Co.* v. *Freundt, supra.*

On page 608 of the Ohio Casualty Ins. case reference is made to the provisions of the garnishment law of the State of Oklahoma, and two-thirds of a page consumed by quotations therefrom and cases construing the same.

The garnishment laws of the State of Oklahoma were adopted from the garnishment laws of the State of Kansas. See Oklahoma Statutes 1931, Vol. 1, Section 527, *et seq.*, Compiled Statutes of Oklahoma 1921, Section 340, *et seq.* It will be noted that Sec. 624, Chapter 3, Article 2, 12 Okla. Stat. Annotated, is exactly the same as Sec. 60-950, of the General Statutes of Kansas, Annotated, 1935, originally enacted in 1889, and is as follows:

> "Sec. 624. *Defendant May Answer for Garnishee or Garnishee for Defendant.* The defendant may in all cases, by answer duly verified, to be served within twenty days from the service of the garnishee summons on him, defend the proceedings against any

garnishee, upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant, or for any other reason is not liable to garnishment; or upon any ground upon which a garnishee might defend the same; and may participate in the trial of any issue between the plaintiff and garnishee for the protection of his interests. The garnishee may, at his option, defend the principal action for the defendant, if the latter does not, but shall be under no obligation so to do."

It will further be noted that so far as this case, or the Ohio Casualty Ins. Co. case is concerned, that Sec. 625 of Chapter 3, Article 2, 12 Okla. Stat., is exactly as Sec. 60-951 of the General Statutes of Kansas.

The court, of course, will take judicial notice that Oklahoma was admitted to the Union long subsequent to that date.

The court, in the case of *Casualty Ins. Co.* v. *Gordon*, 95 Fed. (2d) 605, quotes Sec. 625 as follows:

"The proceeding against a garnishee shall be deemed an action by plaintiff against garnishee and defendant. • • •."

This being the same as Sec. 60-951 of the Kansas Statutes aforesaid, and having been adopted from the State of Kansas, the construction placed by the courts of Kansas upon this statute will be controlling, *Erie* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, *Stoner* v. *N. Y. L. Ins. Co.*, 311 U. S. 464, 85 L. ed. 275, 61 S. Ct. 336, *Nelson* v. *Stull*, 65 Kansas 585, 68 Pac. 617, and the case of *Swofford Bros. D. G. Co.* v. *John S. Britton D. G. Co.*, 9 Kansas App. 1, 57 Pac.

235, construes this statute as changing a garnishment proceeding, under the laws of the State of Kansas, from being merely an incident to the original action to a separate, independent and extraordinary remedy in the following language, l. c. 236, 237:

> "• • •. Section 1, c. 151, Laws 1889 (sections 227, 228, c. 95, Gen. St. 1897), relating to proceedings in garnishment, provides: 'Any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person (excepting a municipal corporation), who shall be indebted to, or have any property, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases, upon the conditions and in the manner hereinafter described.' The proceedings in garnishment, prior to the passage of this act, were merely an incident to that in attachment. Garnishment since is a separate, independent, provisional remedy, governed entirely by the act in question. This court, in the case of *Kellogg* v. *Hazlett*, 2 Kan. App. 529, 43 Pac. 989, said: 'As garnishment is a special and extraordinary remedy, it can be used only at the times and upon the grounds expressly authorized by statute. The statutory conditions for its exercise are conclusive, and exclusive of all others.' • • •"

See also the case of the *First National Bank of Fort Scott* v. *Elliott*, 62 Kansas 764, 64 Pac. 623, in which this statute was quoted and the garnishee considered and treated as a defendant.

Under the laws of the State of Oklahoma, Sec. 614, Chapter 3, Article 2, Oklahoma Statutes of 1931, it is necessary that the plaintiff file an affidavit and bond upon which a summons is issued to the garnishee and defendant. The form of summons is provided in Sec. 616 and Sec.

625, *supra*, provides that garnishment is an action by the plaintiff against the garnishee and the defendant. It is, therefore, quite plain that in the case of Ohio Casualty Co. vs. Gordon the court took into consideration the distinction between garnishment proceedings under the laws of the State of Oklahoma and garnishment proceedings under the laws of other states, and that by reason of the fact that under the laws of the State of Oklahoma garnishment proceedings constituted an entirely distinct and separate cause of action from that in which the plaintiff obtained his original judgment, the matters of defense set up by the plaintiff could not have been litigated in a garnishment proceeding if brought. Further, in the Ohio Casualty Ins. case the bill of complaint was never challenged by a motion to dismiss but the court's judgment was invoked by cross complaints which were filed by the defendants. The distinction between the case of *Ohio Casualty Co.* v. *Gordon, supra,* and the *American Automobile Ins. Co.* case v. *Freundt,* 103 Fed. (2d) 615, *supra,* is noted in the latter case, the court saying, l. c. 618:

> "In Ohio Casualty Ins. Co. vs. Gordon, an insured had caused injury to two persons. One insured obtained judgment and in garnishment obtained judgment against the insurer. The other injured person obtained judgment *but took no further steps;* and about two years afterwards the insurer sought a declaration of rights. The Court of Appeals held that certain issues presented in the declaration suit could not have been litigated in the prior actions, that the court *had jurisdiction* to declare the rights in respect thereto, and that the insurer 'was entitled to invoke' the Declaratory Judgment Act. The opinion discloses that the material consideration was that all the questions presented in the declaratory suit could not have been litigated in prior actions." (Italics ours.)

It is, therefore, quite apparent that in the Ohio Casualty Co. case there were issues which could not have been litigated in the prior (liability for instance) action, whereas, in this case, under the authorities cited in our original brief every defense is open to appellant. This was the position taken by the court, as it went to some length to explain the garnishment laws of Oklahoma, evidently in support of its jurisdiction. l. c. 608-9.

Respondent also relies upon the case of *Employers Liability Assurance Corp.* v. *Ryan*, 109 F. (2d) 690 (CCA 6, 1940); cert. granted, 310 U. S. 621, 60 S. Ct. 1067. In that case the judgment creditor sought to assert a judgment which he had obtained against the defendant's insurer, Employers Liability Assurance Corporation, under Sections 9510-3 and 9510-4, General Code of Ohio, Sec. 9510-4 reading as follows, to-wit:

> "Sec. 9510-4. *When judgment creditor entitled to have insurance money applied to judgment.* Sec. 2. Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, if the defendant in such action was insured against loss or damage at the time when the right of action arose, • • • if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in a legal action against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment."

The learned Judge, who wrote the majority opinion, prefaced the same by the following:

> "Sections 9510-3 and 9510-4, of the General Code of Ohio permit an injured party a direct action

against his judgment debtors insurers after he has obtained a judgment against the insured."

It is, therefore, quite apparent, according to the conception of the majority opinion, that the same situation existed in the Ryan case as in the *Gordon* case, *supra*, to-wit, that the subsequent proceedings to enforce the judgment against the insurer were entirely separate and distinct causes of action and not a continuation of the original action against the assured. No other conclusion is possible and this is supported by the decision of the same court in the case of *Western Supplies Co.* v. *Freeman*, 109 F. (2d) 693, immediately following the Ryan case, in which the dismissal of plaintiff's bill was affirmed the court using the following language, l. c. 695:

"• • •

"The decision in *Employers' Liability Assurance Corp.* v. *Ryan, et al.*, 6 Cir., 109 F. (2d) 690, this day decided, is not at variance with the conclusion reached herein. In that case, no other proceeding was pending between the parties thereto, when the bill for declaratory judgment was filed, in which the same questions were involved."

The Freeman case is commented upon in connection with Professor Borchard's criticism of the Ryan case in Note 8 at page 313, Borchard Declaratory Judgments, Second Edition.

In the Ryan case there was a powerful dissenting opinion by Judge Allen, l. c. 692, as follows:

"Section 400, 28 U.S.C., 28 U.S.C.A., Sec. 400, provides that in cases of actual controversy the courts of the United States 'shall have power' to grant this relief. The relief prayed for hence is afforded not as a matter of right. *American Automobile Ins. Co.* v.

Freundt, 7 Cir., 103 F. (2d) 613; *E. W. Bliss Co.* v. *Cold Metal Process Co., supra.* The relief may be refused if it is sought merely to determine issues involved in cases *pending*. *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.*, 3 Cir., 101 F. (2d) 514. The obvious intent of this provision was not to duplicate actions. It was to avoid delay and the accrual of damages against one uncertain of his rights and to promote an early adjudication of the controversy between the parties without waiting until one of them should see fit to begin suit for coercive relief after damages had accrued. *Davis* v. *American Foundry Equipment Co.*, 7 Cir., 94 Fed. (2d) 441, 115 A. L. R. 1486. It is a kind of expanded bill *quia timet*. *Meeker* v. *Baxter*, 2 Cir., 83 F. (2d) 183. • • •

As this is a bill in the nature of an equitable proceeding, the District Court correctly considered the facts, duly pleaded and presented in evidence, which had occurred subsequently to the filing of the petition, and exercised a sound discretion in dismissing the bill. *Aetna Casualty & Surety Co.* v. *Quarles*, 4 Cir., 92 F. (2d) 321; *United States Fidelity & Guaranty Co.* v. *Koch*, 3 Cir., 102 F. (2d) 288." (Italics ours.)

The soundness of the principles enunciated in the dissenting opinion must commend themselves to any court which seeks to avoid unnecessary litigation. If the principle laid down in the principal opinion in the Ryan case is to be the law, then all discretion is taken from the *nisi prius* judge, which is contrary to all interpretations of the Declaratory Judgment Act and the only case which so holds.

It is further significant that this court granted a writ of certiorari in the Ryan case, as aforesaid, which was dismissed pursuant to Rule 35, U.S.C.A., 310 U. S. 654, 60 S. Ct. Rpr. 1107. Rule 35 provides:

"Rule 35. Dismissing Cases in Vacation. Whenever the appellant and appellee in an appeal, or the pefitioner and respondent in a petition for or writ of certiorari, shall in vacation, by their attorneys of record, file with the clerk an agreement in writing that such appeal, petition for or writ of certiorari shall be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter such dismissal and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue on such dismissal without an order of the court. (See Rules 31 and 34.)"

We do not think it is stretching the imagination too far to conclude that in view of the fact that this court issued a writ of certiorari in the Ryan case, the insurance company preferred to have the interpretation of the Declaratory Judgment Act remain in the chaotic condition it is upon this point than to be finally settled by a decision of this court.

The Ryan case was criticized by Professor Borchard on page 313 of his work as follows:

"True, the mere availability of another remedy is not a ground for declining a declaration, but the actual pendency of a prior suit which could in one action settle the whole case and the interests of all the parties involved may for reasons of judicial economy be an adequate ground for not starting a second suit. Circuit Judge Simons' opinion in *Employers Liability Assurance Corp.* v. *Ryan* is in this respect questionable, for Rule 57 contemplated not that the declaration should be granted when complete adjudication could be afforded in a pending suit involving identical issues, but that the mere existence of a coercive remedy which might have been available was not to bar an action for a declaration."

The effect of the opinion is much weakened by the powerful dissenting opinion and the granting by this court of a writ of certiorari to review the same.

In the case of *U. S. Fidelity & Guaranty Co.* v. *Koch*, 102 Fed. (2d) 288 (CCA 3, 1939), it is difficult to determine upon what basis the court did reverse and remand the case. The principal reason appears to be because the District Court apparently held that the defendant-appellee was entitled to a jury trial and that such could not be had under the Federal Declaratory Judgment Act. However, Professor Borchard seems to be of the opinion that special circumstances of unusual delay in the state proceedings persuaded the court to allow a federal declaratory action on the issue of coverage, Borchard 659, note 99.

In the case of *Western Casualty & Ins. Co.* v. *Beverforden*, 93 Fed. (2d) 166 (CCA 8, 1937), the issues were not at all similar to those herein. The questions of a pending action in which the issue could be decided, the removability of the cause to the Federal Court by way of a bill for declaratory judgment, the anticipation of a defense to the pending action, the peculiar statutory remedy provided by Missouri law, and attempting to have the Federal Court review the proceedings had in the Circuit Court of Jackson County, Missouri, were not in that case.

The Beverforden case was further considered, discussed, criticized and discounted in the later case of *American Automobile Insurance Co.* v. *Freundt, supra*, in which the court said:

> "The question of the exercise of the court's discretion was not raised in either the Beverforden or the Foulke cases and consequently they are no authority here."

The opinion in the Beverforden case is further weakened by the subsequent opinion of the same court in the case of *Thompson* v. *Moore*, 109 Fed. (2d) 372 (CCA 8, 1940), which followed and quoted from the case of *American Automobile Ins. Co.* v. *Freundt*, 103 Fed. (2d) 613 (CCA 7, 1939).

In the case of *Aetna Life Ins. Co. of Hartford, Conn.* v. *Martin*, 108 Fed. (2d) 824 (CCA 8, 1940), the court, l. c. 827, specifically stated that the pendency of a prior action was not presented by the record and that therefore they would not consider whether or not the pendency of a prior action would preclude the right to maintain a declaratory judgment action.

That a case was pending in the Circuit Court of Jackson County, Missouri, in which repondent's rights could be determined cannot be gainsaid. Respondent does not directly state that all the issues could not be determined in the garnishment proceeding. It merely intimates that such is the case without disclosing any factual or legal basis therefor. As a matter of fact there is only one issue to be decided and, of course, such subsidiary issues as are connected with the main issue, and that is the liability of the respondent to the petitioner upon the judgment rendered in the Circuit Court of Jackson County, Missouri; that such case is a pending action was decided in the case of *Hill* v. *Martin*, 296 U. S. 393, 403, 56 S. Ct. 278, 282, 80 L. ed. 293, in which this court said:

> "That term ('proceedings') is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to

action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective."

This was commented upon favorably in the recent cases of *Toucey* v. *N. Y. Life Ins. Co.* and *Phoenix Finance Corp.* v. *Iowa-Wisconsin Bridge Co.*, Nos. 16 and 19, 62 S. Ct. 139 (not officially reported).

The case of *Maryland Casualty Co.* v. *Pacific Coal & Oil Co., et al.*, 312 U. S. 270, 61 S. Ct. 510, 85 L. ed. 455, does not support the view of respondent. That was merely a case to determine whether or not the insurance company was bound to defend a cause of action brought against the assured, and inasmuch as this question could not be decided in such action the District Court was required to take jurisdiction.

II.

As to Rule No. 57.

Respondent by its argument under Point III admits the plain conflict between the Ryan case and the Quarles, Freundt and Thompson cases, but seeks to reconcile such conflict by the statement that the Quarles case was one of the earlier decisions dealing with the Federal Declaratory Judgment Act and that the principle enunciated therein had been superseded by Rule 57, Rules of Civil Procedure.

However, as the Freundt and Thompson cases were decided subsequent to the adoption of Rule 57, this reasoning cannot apply thereto and respondent shifts to the argument, in order to distinguish the Freundt case, by stating that "the only question properly before the Mis-

souri court in the garnishment proceeding is whether or not respondent owes Central, the judgment debtor." This, of course, is not true, the only question before the Missouri court being whether or not the respondent owed Cooper-Jarrett, Inc. This was conceded by the respondent at the hearing (R. 38), in which Mr. Woods stated to the court:

> "on May 29th of this year, summons and garnishment were issued by this defendant Brillhart and in the Young case also, against the plaintiff in this case. Of course, it ran—because of the judgments against Cooper-Jarrett and Central in the Brillhart case; since they had obtained no judgment against Centr —*it ran directly from Cooper-Jarrett to Excess.*" (Italics ours.)

Respondent, therefore, was outside the record when it stated that the only question properly before the Missouri court was whether or not respondent owed the Central, and this argument is self-contradictory because if the only question involved was whether or not respondent owed Central, that would be a matter in which petitioner would have no interest. The question involved is whether or not the respondent owed Cooper-Jarrett, Inc.; otherwise a garnishment proceeding could not be successfully asserted against respondent.

Rule No. 57 of the Rules of Civil Procedure provides in part that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." The opinion in the Ryan case was influenced by the conception that said rule was applicable even though the other "adequate remedy" may have been a special statutory remedy and even though such other remedy be more suitable and more appropriate.

Such an interpretation of the rule petitioner submits is erroneous and is in conflict with the Notes of the Advisory Committee on Rules, see Rule 57, Title 28, U.S.C.A., following Sec. 723c, where we find the following:

> "*A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case,* but general, ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.
>
> "* * *. The demand for relief shall state with precision the declaratory judgment desired, * * *. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the federal act. Compare *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000 (1937); *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191 (1933); *Gully, Tax Collector*, v. *Interstate Natural Gas Co.*, 82 F. (2d) 145 (CCA 5th, 1936); *Ohio Casualty Ins. Co.* v. *Plummer*, 13 F. Supp. 169 (S.D. Tex., 1935); Borchard, Declaratory Judgments (1934), *passim.*"

It will be noted that the term "appropriate" was used in the notes, evidently for some purpose, and such purpose was to give the court discretion to determine among other things its own jurisdiction and whether or not a case was one in which it should exercise such jurisdiction. Furthermore, as shown under Point I of this argument, it was the intention of Congress to apply the principles of the Uniform Declaratory Judgment Act in interpreting and administering the Federal Declaratory Judgment Act. This is commented upon by Professor Borchard in his work, referred to at page 313, as follows, to-wit:

"The declaratory remedy is not like an ordinary equitable remedy in which the federal courts have on occasion remarked that when the plaintiff has the right to invoke the federal jurisdiction, the court is bound to take the case and proceed to judgment. Nor does the fact that the Report of the Judiciary Committee of the Senate makes no direct reference to the discretionary exercise of the power granted by the Federal Act militate against the rule of discretion.

"While the Uniform Act contains a section expressly providing that the grant of a declaratory judgment is discretionary, and may be refused if it would not terminate the uncertainty or controversy giving rise to the proceeding, the reason was that it seemed necessary to write into the Uniform Act as much as possible of the established jurisprudence so as to guide state courts. But it was thought best to make the Federal Act a short one and to include only such provisions as were indispensable. *Hence, although discretion is not specifically mentioned, there was no intention to modify the established rules of law.* The Committee Note under Federal Rule 57 expressly provides that 'the Uniform Declaratory Judgments Act affords a guide to the scope and function of the federal act.'" (Italics ours.)

Also in footnote 8 on the same page (313), wherein the holding in the Ryan case is criticized, he said:

"Hence the final clause 'in cases where it is appropriate.' Judge Allen in dissent assumes that a state action was pending, in which supplementary proceedings involving the same issues could have been brought, hence that the declaration should have been declined."

NOTE: The Uniform Declaratory Judgment Act is set forth in the appendix at page 1039 and

Federal Rule 57 and Committee Note at page 1042 of Borchard on Declaratory Judgments, Second Edition.

In approving the holding of the Circuit Court of Appeals in the case of *American Automobile Insurance Company* v. *Freundt*, 103 Fed. (2d) 613 (CCA 7, 1939), Professor Borchard said, p. 658:

> "So, where judgment had been recovered against the insured in an Illinois court and attorneys had been engaged to file garnishment proceedings against the insurance company, the federal court was right in refusing to exercise jurisdiction of a declaratory action of the company to establish non-liability, since the garnishment proceeding was ancillary to the original state action and the company's liability could be fully adjudicated in that proceeding."

And, further, in footnote 93 he mentioned the fact that such holding lent support to Judge Allen's dissent in the Rogers case.

It is plain that the conception of Rule 57 by the Circuit Courts of Appeal in the Ryan and present cases does violence to the settled rule that the Declaratory Judgment Act should be reasonably construed to effectuate its purpose to reduce litigation and to lighten its burdens.

Conclusion.

It appears to petitioner that the problem of finally determining the liability of respondent is impossible of solution in this case for two reasons:

First, because the policy of the law, as held by this court in the case of *Maryland Casualty Co.* v. *Pac. Coal*

& Oil Co., 312 U. S. 270, 274, 61 S. Ct. 510, 512, not to permit conflicting decisions and interpretations of evidence between federal and state courts in the same or companion cases would be violated herein if the companion cases of Young and the other judgment creditors of Cooper-Jarrett, Inc., should recover in the state court.

It would indeed be a novel situation if the petitioner herein be denied a recovery by a declaratory judgment of the District Court and his co-defendants in the dismissed declaratory judgment suit, filed in the federal court in Missouri, and the administrator of his co-defendant herein be permitted to recover in their garnishment proceedings against respondent when the relation of all of the Missouri judgment creditors was the same as regards Cooper-Jarrett, Central and respondent, which must be true, otherwise respondent would not have joined them as co-defendants in the Missouri suit. A similar situation existed in the case of *Jenkins* v. *Kurn*, 144 S. W. (2d) 76, reversed and remanded 313 U. S. 256, 61 S. Ct. 934. In that case the engineer was killed and the fireman injured in a collision. The administratrix of the engineer recovered a judgment which was affirmed by the Supreme Court of Oklahoma, *Kurn* v. *Reese*, Journal Oklahoma Bar Association, Volume No. 11, No. 20, pages 947-50 (not officially reported). Jenkins also recovered a judgment which was reversed outright by the Supreme Court of Missouri and this court issued its writ of certiorari and reversed and remanded the decision of the Missouri Supreme Court.

Second, a declaration should not be permitted if petitioner's understanding of the rule announced in the cases of *Toucey* v. *N. Y. Life Ins. Co.* and *Phoenix Finance*

Corp. v. *Iowa, Wisconsin Bridge Co.*, Nos. 16 and 19, respectively, 62 S. Ct. 139 (not officially reported), and *Southern Ry. Co.* v. *Painter*, No. 24, 62 S. Ct. 154 (not officially reported), is correct.

As a decree in a declaratory judgment proceeding is not coercive in its nature a judgment rendered therein could only be made effective by a plea of *res adjudicata* in a relitigation of the same subject matter, Borchard, pages 11 and 12. Assuming then that the District Court should render a declaration of non-liability of respondent, this would not prevent the prosecution of the garnishment proceedings already instituted in the state court, see Toucey and Phoenix cases above. Let us then assume that petitioner recovers against respondent on the garnishment proceedings in the state court. We then have the very situation condemned in the case of *Maryland Casualty Co.* v. *Pac. Coal & Oil Co., supra.* If both cases are affirmed on appeal we then have a situation similar to that in the case of *Stoner* v. *N. Y. Life Ins. Co.*, 311 U. S. 464, 61 S. Ct. 336, 85 L. ed. 275, and as this court is bound to follow the state law the declaratory judgment would necessarily have to be reversed and the state court judgment affirmed upon certiorari. Another dilemma would exist if the declaration was rendered first, pleaded in bar in the state garnishment proceedings, disregarded by the state court, and a judgment for plaintiff affirmed by the state appellate court.

Under the *Stoner* and *Tompkins* cases, *supra*, the state appellate court must necessarily disregard the plea of *res adjudicata*, if in conflict with state law, and how could this court then hold that the declaration was *res adjudicata* as to the garnishment proceedings when the

state court had decided the matter contrary to the principles upon which the decision in the federal court was based. To hold otherwise would be to permit federal courts to place their own interpretation upon the laws and statutes of the state and thus to frustrate the state law and again bring into operation the practices which were condemned in the cases of *Erie R. Co.* v. *Tompkins* and *Stoner* v. *N. Y. Life Ins. Co., supra,* and evade the provisions of Sec. 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C., Sec. 725, 28 U.S.C.A. 725, which provides:

> "The laws of the several states except where the constitution, treaties or statutes of the United States otherwise require or provide shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

By its argument on pages 11 and 12 of its brief respondent admits that the garnishment proceeding in Missouri is a part and parcel of the original suit against Cooper-Jarrett. It is so held by this court in the case of *Hill* v. *Martin and Dorrance, et al.,* 296 U. S. 393, 403, 56 S. Ct. 278, 282, 80 L. ed. 293, and cited with approval in the *Toucey* and *Phoenix Finance Corporation* cases, *supra.* It cannot be that a declaratory judgment proceeding may permit a federal court to exercise an independent judgment as to what the law of a state is and thereby evade the statutory provisions and cases cited above, and thus mould the state law and circumvent the rule of the Tompkins and Stoner cases.

We respectfully, therefore, submit that the decree and judgment of the United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Honorable Court and that of the District Court affirmed.

CLARENCE C. CHILCOTT,
918 Scarritt Building,
Kansas City, Missouri,
STUART T. MCALISTER,
Parsons, Kansas,
Attorneys for Petitioner.

RATNER, MCALISTER & MATTOX,
Of Counsel.